

BOIES, SCHILLER & FLEXNER LLP
 RICHARD J. POCKER (NV Bar No. 3568)
 300 South Fourth Street, Suite 800
 Las Vegas, NV 89101
 Telephone: (702) 382-7300
 Facsimile: (702) 382-2755
rpocker@bsflp.com

BOIES, SCHILLER & FLEXNER LLP
 STEVEN C. HOLTZMAN (*pro hac vice*)
 FRED NORTON (*pro hac vice*)
 KIERAN P. RINGGENBERG (*pro hac vice*)
 1999 Harrison Street, Suite 900
 Oakland, CA 94612
 Telephone: (510) 874-1000
 Facsimile: (510) 874-1460
sholtzman@bsflp.com
fnorton@bsflp.com
kringgenberg@bsflp.com

Attorneys for Oracle USA, Inc., Oracle
 America, Inc., and Oracle International
 Corporation

BINGHAM MCCUTCHEN LLP
 GEOFFREY M. HOWARD (*pro hac vice*)
 THOMAS S. HIXSON (*pro hac vice*)
 KRISTEN A. PALUMBO (*pro hac vice*)
 Three Embarcadero Center
 San Francisco, CA 94111-4067
 Telephone: 415.393.2000
 Facsimile: 415.393.2286
geoff.howard@bingham.com
thomas.hixson@bingham.com
kristen.palumbo@bingham.com

DORIAN DALEY (*pro hac vice*
application to be submitted)
 DEBORAH K. MILLER (*pro hac vice*)
 JAMES C. MAROULIS (*pro hac vice*)
 ORACLE CORPORATION
 500 Oracle Parkway
 M/S 5op7
 Redwood City, CA 94070
 Telephone: 650.506.4846
 Facsimile: 650.506.7114
dorian.daley@oracle.com
deborah.miller@oracle.com
jim.maroulis@oracle.com

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

ORACLE USA., INC., a Colorado corporation,
 ORACLE AMERICA, INC., a Delaware
 corporation; and ORACLE INTERNATIONAL
 CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation;
 and SETH RAVIN, an individual,

Defendants.

Case No. 2:10-cv-0106-LRH-PAL

**PLAINTIFFS ORACLE USA, INC.,
 ORACLE AMERICA, INC., AND
 ORACLE INTERNATIONAL
 CORPORATION'S MOTION TO
 DISMISS COUNTERCLAIMS AND
 STRIKE AFFIRMATIVE DEFENSE**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY OF ALLEGATIONS	2
A.	Oracle’s Complaint	2
B.	Rimini’s Counterclaims	3
III.	ARGUMENT	5
A.	Rimini’s First Cause of Action Fails to State a Claim	6
1.	Rimini Cannot Base a Claim on Statements in Oracle’s Court Filings.....	7
2.	Rimini Fails to Plead Facts Showing Any Defamatory, Published Statement.....	8
a.	Rimini Must Plead the Substance of Any Allegedly Defamatory, Published Statement.....	8
b.	Rimini Fails to Plead the Substance of Any Allegedly Defamatory, Published Statement.....	9
c.	Rimini’s Pleading Fails to Give Oracle Fair Notice of the Claim	11
B.	Rimini Fails to State a Copyright Misuse Defense	13
1.	Restrictions on Access and Use of Copyrighted Materials Are Not Misuse of Copyright.....	13
2.	Rimini’s Misuse Defense Fails Because It Alleges Only Restrictions on Access and Use of Copyrighted Works	15
3.	Rimini’s Conclusory Allegation that Oracle’s Licenses “Effectively” Prevent Customers from Using Third-Party Support Fails on the Facts Alleged by Rimini Itself and the Law	18
4.	Rimini’s Copyright Misuse Affirmative Defense Should Be Stricken	19
C.	Rimini Fails to State a Claim under California’s Unfair Competition Law	19
	CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	13, 14, 15, 17
<i>Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.</i> , 845 F. Supp. 356 (E.D. Va. 1994).....	16, 17
<i>Aetna Cas. & Sur. Co v. Centennial Ins. Co.</i> , 838 F.2d 346 (9th Cir. 1998).....	7
<i>Alcatel USA, Inc. v. DGI Technologies, Inc.</i> , 166 F.3d 772 (5th Cir. 1999).....	14
<i>Apple, Inc. v. Psystar Corp.</i> , 673 F. Supp. 2d 931 (N.D. Cal. 2009)	14, 16, 17
<i>Aronson v. Kinsella</i> , 58 Cal. App. 4th 254 (Cal. Ct. App. 1997)	8, 11
<i>Ashcroft v. Iqbal</i> , ___ U.S. ___, 129 S.Ct. 1937 (2009)	<i>passim</i>
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	5, 8, 9, 11
<i>Blanck v. Hager</i> , 360 F. Supp. 2d 1137 (D. Nev. 2005)	9
<i>Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.</i> , 20 Cal. 4th 163 (Cal. 1999).....	19, 20
<i>Church of Scientology of Cal. v. Flynn</i> , 744 F.2d 694 (9th Cir. 1984).....	9
<i>Clark County Sch. Dist. v. Virtual Educ. Software, Inc.</i> , 213 P.3d 496 (Nev. 2009)	6, 7
<i>Cunningham v. Hamilton County, Ohio</i> , 527 U.S. 198 (1999).....	15
<i>Dictor v. Creative Mgmt. Servs., LLC</i> , 223 P.3d 332 (Nev. 2010)	7
<i>E & E Co., Ltd. v. Kam Hing Enterprises, Inc.</i> , No. C-08-871-MMC, 2008 WL 4962991 (N.D. Cal. Nov. 19, 2008)	11, 12
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003)	13, 17

1	<i>First Advantage Background Servs. Corp. v. Private Eyes, Inc.</i> ,	
2	569 F. Supp. 2d 929 (N.D. Cal. 2008)	9
3	<i>Flowers v. Carville</i> ,	
4	266 F. Supp. 2d 1245 (D. Nev. 2003)	12
5	<i>Fortaleza v. PNC Fin. Servs. Group, Inc.</i> ,	
6	642 F. Supp. 2d 1012 (N.D. Cal. 2009)	19
7	<i>Gertz v. Robert Welch, Inc.</i> ,	
8	418 US 323 (1974)	12
9	<i>Ghawanmeh v. Islamic Saudi Acad.</i> ,	
10	672 F. Supp. 2d 3 (D.D.C. 2009)	9, 10
11	<i>Gilbert v. Sykes</i> ,	
12	147 Cal. App. 4th 13 (Cal. Ct. App. 2007)	12
13	<i>In re Napster</i> ,	
14	191 F. Supp. 2d 1087 (N.D. Cal. 2002)	14
15	<i>Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.</i> ,	
16	12 F. Supp. 2d 1035 (C.D. Cal. 1998)	6, 12
17	<i>Jacobson v. Schwarzenegger</i> ,	
18	357 F. Supp. 2d 1198 (C.D. Cal. 2004)	9, 10
19	<i>Kearns v. Ford Motor Co.</i> ,	
20	567 F.3d 1120 (9th Cir. 2009).....	20
21	<i>Khoury v. Maly's of Cal., Inc.</i> ,	
22	14 Cal. App. 4th 612 (Cal. Ct. App. 1993)	19
23	<i>Lasercomb America, Inc. v. Reynolds</i> ,	
24	911 F.2d 970 (4th Cir. 1990).....	14
25	<i>Mann v. Quality Old Time Servs., Inc.</i> ,	
26	120 Cal. App. 4th 90 (Cal. Ct. App. 2004)	6
27	<i>Mattel, Inc. v. MCA Records, Inc.</i> ,	
28	28 F. Supp. 2d 1120 (C.D. Cal. 1998)	12
	<i>Mazer v. Stein</i> ,	
	347 U.S. 201 (1954)	17
	<i>MDY Industries, LLC v. Blizzard Entm't Inc.</i> ,	
	No. CV-06-2555, 2008 WL 2757357 (D. Ariz. Jul. 14, 2008)	15
	<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> ,	
	454 F. Supp. 2d 966 (C.D. Cal. 2006)	14
	<i>Microsoft Corp. v. BEC Computer Co.</i> ,	
	818 F. Supp. 1313 (C.D. Cal. 1992).....	15

1	<i>Microsoft Corp. v. Computer Support Servs. of Carolina, Inc.</i> ,	
2	123 F. Supp. 2d 945 (W.D.N.C. 2000)	15, 19
3	<i>Multimedia Patent Trust, v. Microsoft Corp.</i> ,	
4	525 F. Supp. 2d 1200 (S.D. Cal. 2007)	19
5	<i>Pope v. Motel 6</i> ,	
6	114 P.3d 277 (Nev. 2005)	7
7	<i>Practice Mgmt. Info. Corp. v. Am. Med. Ass’n</i> ,	
8	121 F.3d 516 (9th Cir. 1997)	14, 15
9	<i>Roland-Warren v. Sunrise Senior Living, Inc.</i> ,	
10	No. 09-CV-1199-JM, 2009 WL 2406356 (S.D. Cal. Aug. 4, 2009)	12
11	<i>Rubio v. Capital One Bank (USA), N.A.</i> ,	
12	572 F. Supp. 2d 1157 (C.D. Cal. 2008)	20
13	<i>Saldate v. Wilshire Credit Corp.</i> ,	
14	____ F.R.D.____, No. CV-F-09-2089-LJO-SMS, 2010 WL 582069 (E.D. Cal.	
15	Feb. 12, 2010)	19
16	<i>Scott v. Solano County Health & Soc. Servs. Dep’t</i> ,	
17	459 F. Supp. 2d 959 (E.D. Cal. 2006)	9
18	<i>Service & Training, Inc. v. Data Gen. Corp.</i> ,	
19	963 F.2d 680 (4th Cir. 1992)	16
20	<i>Silberg v. Anderson</i> ,	
21	50 Cal. 3d 205 (Cal. 1990)	7
22	<i>Silicon Knights, Inc. v. Crystal Dynamics, Inc.</i> ,	
23	983 F. Supp. 1303 (N.D. Cal. 1997)	9, 10
24	<i>Sosa v. DIRECTV, Inc.</i> ,	
25	437 F.3d 923 (9th Cir. 2006)	8, 11
26	<i>Swartz v. KPMG LLP</i> ,	
27	476 F.3d 756 (9th Cir. 2007)	20
28	<i>Taus v. Loftus</i> ,	
	40 Cal. 4th 683 (2007)	7
	<i>Ticketmaster LLC v. RMG Techs., Inc.</i> ,	
	536 F. Supp. 2d at 1198	20
	<i>Triad Systems Corp. v. Southeastern Express Co.</i> ,	
	64 F.3d 1330 (9th Cir. 1995)	15, 16
	<i>Vess v. Ciba-Geigy Corp. USA</i> ,	
	317 F.3d 1097 (9th Cir. 2003)	20
	<i>Weisbuch v. County of Los Angeles</i> ,	
	119 F.3d 778 (9th Cir. 1997)	18

Williams v. County of Los Angeles,
No. CV-06-1766-DSF, 2006 WL 4756376 (C.D. Cal. June 19, 2006)..... 11

Wyshak v. City Nat’l Bank,
607 F.2d 824 (9th Cir. 1979)..... 19

Statutes

Cal. Bus. & Prof. Code § 17200 1, 5, 19

Cal. Civil Code § 47..... 7

Rules

Fed. R Civ. P. 9 20

Fed. R. Civ. P. 12 1, 11, 12, 19

Fed. R. Civ. P. 8 *passim*

**PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS AND
STRIKE AFFIRMATIVE DEFENSE**

Plaintiffs Oracle USA, Inc. ("Oracle USA"), Oracle America, Inc. ("Oracle America") and Oracle International Corporation ("OIC") (together "Oracle" or "Plaintiffs") file this motion pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6) to dismiss the Counterclaim of Rimini Street, Inc. ("Rimini"), asserting claims of (1) defamation, business disparagement and trade libel; (2) declaratory relief as to copyright misuse; and (3) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. Plaintiffs also move pursuant to Rule 12(f) to strike Rimini's fourth affirmative defense of copyright misuse.

I. INTRODUCTION

In response to Oracle's Amended Complaint, Rimini and its founder Seth Ravin have answered the claim of copyright infringement and breach of contract and moved to dismiss Oracle's other claims.¹ Rimini has also asserted three counterclaims – but they are counterclaims in name only. Each is merely a repackaging of the defenses that Rimini intends to offer in response to Oracle's own complaint – both in the Court and, perhaps more importantly, in the press. The counterclaims are each legally meritless, and should be disposed of at the outset.

Rimini's first claim, for defamation and trade libel, alleges that an unspecified Oracle representative "insinuated" in some unspecified way to an unspecified industry analyst that some unspecified "Rimini Street practices" are "illegal." Because Rimini fails to allege the substance of the allegedly defamatory statement, its claim fails under settled law. Rimini's counterclaim hedges on whether Rimini asserts its claim based upon the content of Oracle's Complaint. If that is what Rimini intends to assert, such a claim is barred by the litigation privilege and the *Noerr-Pennington* doctrine. Indeed, Rimini's claims are so vague that they fail to provide Oracle with fair notice of Rimini's claims.

¹ Citations to the Amended Complaint and to the Answer to Oracle's First Amended Complaint and Counterclaim are in the form of (AC ¶ __) and (CC ¶ __) respectively.

Rimini's second claim seeks declaratory relief on the theory that Oracle misused its copyrights. The only conduct that Rimini alleges, however, is that Oracle limits access to and use of Oracle's copyrighted work. As a matter of law, that is not copyright misuse. Further, Rimini asserts that Oracle's exercise of its statutory rights "effectively" prevents customers from contracting with alternative service providers like Rimini. Not only is such a claim contrary to settled law, but Rimini alleges no facts to support it. Moreover, the facts that Rimini does allege – such as the assertion that hundreds of customers have already "made the switch to Rimini" – are flatly contrary to any conclusion that Oracle's terms of use "effectively" prevent customers from making the switch to Rimini. For these same reasons, Rimini's affirmative defense of copyright misuse should be stricken as well.

Rimini's third claim, for violation of California's Unfair Competition Law, rests entirely on the same allegations of supposed defamatory insinuations and of copyright "misuse." For the reasons stated above, Rimini has failed to plead any defamatory conduct and has failed to plead copyright misuse, and thus the Unfair Competition Law claim also must also fail.

II. SUMMARY OF ALLEGATIONS

A. Oracle's Complaint

Oracle is the world's largest enterprise software company. (AC ¶ 25.) Oracle earns revenue by licensing software to businesses and by providing support services, among other things. (*Id.*) Rimini holds itself out as a competitor to Oracle in providing support to companies that license certain Oracle enterprise software applications. (*Id.* ¶¶ 34-35.)

Oracle asserts in this action copyright infringement and other claims against Rimini and its founder and CEO, Seth Ravin. Rimini's business is built on systematic theft of Oracle's intellectual property, including illegal downloading of Oracle's copyrighted software and support materials, such as software applications and environments, updates, bug fixes, and documentation. (*Id.* ¶ 5.) Rimini typically logs on to Oracle's password-protected technical support websites using a customer's credentials, then downloads Oracle material in excess of the customer's authorization under its license agreement – and Rimini has admitted to downloading "tens of thousand files for a single customer." (*Id.* ¶¶ 39-48, 57-60; CC ¶ 26.) Rimini also

1 acquires copies of its customers’ licensed Oracle enterprise applications software, makes illegal
 2 copies of this software, and uses those copies in various illegal ways to offer low-cost support
 3 and induce Oracle’s customers to cancel their support contracts with Oracle in favor of Rimini.
 4 (AC ¶¶ 9, 33-38; 75-79.)

5 Rimini is Mr. Ravin’s second illegal business. His last venture, TomorrowNow, provided
 6 the same types of support services as Rimini. TomorrowNow was purchased by one of Oracle’s
 7 major competitors, SAP AG (“SAP”). SAP eventually shut down TomorrowNow and admitted
 8 that during Mr. Ravin’s management, TomorrowNow engaged in illegal copying of Oracle’s
 9 intellectual property and illegally accessing Oracle’s computer systems. (*Id.* ¶¶ 10-11, 49-50.)

10 **B. Rimini’s Counterclaims**

11 The allegations of Rimini’s counterclaims largely make one point: Rimini denies the
 12 allegations of Oracle’s Complaint, and Rimini will “aggressively defend” against Oracle’s
 13 claims. (CC ¶ 9; *see also id.* ¶¶ 2-8.) Rimini makes its defense stridently, going so far as to
 14 accuse Oracle of asserting “malicious” and “knowingly false” claims. (*Id.* ¶¶ 1-2.)

15 Rimini follows these assertions with paragraphs that read remarkably like Rimini’s
 16 marketing materials – alleging that “[h]undreds of Fortune 500, mid market, small and public
 17 sector organizations around the world have already made the switch to Rimini,” that Rimini is
 18 Oracle’s “fastest-growing” and “[p]rimary competition for after-market support,” that Rimini is
 19 “threatening Oracle’s market control and pricing power,” and that Rimini supposedly is able to
 20 offer better service than Oracle at half the price. (*Id.* ¶¶ 10-19, 31-36.)

21 Oracle disputes these allegations and, at the appropriate time, will prove the allegations
 22 of its Amended Complaint – that Rimini’s growth and low prices have been based on its illegal
 23 copying of Oracle’s intellectual property and other wrongful acts.

24 Rimini further says it “counterclaimed herein so as to end Oracle’s five year campaign of
 25 illegal anticompetitive tactics,” (*id.* ¶ 8), but when it comes time to back up its rhetoric with
 26 substance, it fails to plead facts sufficient to state any claims.

27 Rimini alleges three causes of action. The first is for “defamation, business
 28 disparagement, and trade libel.” (*Id.* ¶¶ 42-43.) In support of this claim, Rimini purports to

1 quote a number of statements by Oracle. For example, Rimini asserts Oracle has made
2 “incendiary and unfounded allegations that Rimini Street and its employees are thieves carrying
3 out a ‘corrupt’ and ‘illegal business model.’” (*Id.* ¶ 44.) While Rimini does not allege the source
4 of these words, they are found in Oracle’s Complaint (*id.* ¶¶ 5, 10, 14), and Rimini does not
5 allege either that Oracle ever made these statements in any place other than the Complaint or that
6 they were ever “published.”

7 Rimini’s most specific allegation of any alleged publication is: “an Oracle representative
8 contacted a senior analyst for an influential analyst firm and made statements insinuating that
9 Rimini Street’s practices were illegal.” (CC ¶ 45.) Rimini also alleges that “[s]imilar allegations
10 of illegality” were made to others, and says it “expects discovery will illuminate a pattern of
11 similar defamatory communications.” (*Id.*) Rimini fails to plead who made these statements; to
12 whom these statements were made; when they were made; how they were made (verbally or in
13 writing); or which “practices” Oracle “insinuated” were unlawful. Rimini merely asserts the
14 supposed statements were false (*id.* ¶¶ 46-47) and then goes on to make a number of allegations
15 aimed to show that certain of Rimini’s practices were legal. (*Id.* ¶¶ 49-53.) Rimini also alleges
16 that Oracle “knew” Rimini was behaving lawfully because, in substance, Rimini told Oracle so,
17 and because of a supposed Rimini offer to permit a third-party audit of unspecified practices.
18 (*Id.* ¶ 54.)

19 Second, Rimini asserts a claim for declaratory relief based on the affirmative defense of
20 copyright misuse. Rimini makes no claim, however, that Oracle has attempted to extend
21 copyright protection to materials that are not subject to copyright. Rimini concedes that Oracle’s
22 distribution of Software and Support Materials via its websites are subject to “browser-wrap” or
23 “click-wrap” agreements, and alleges that Oracle “has attempted” to use the “design of its
24 support website” and the agreements to “interfere with a customer’s ability to select a support
25 vendor other than Oracle.” (*Id.* ¶ 59.) However, Rimini alleges only two specific acts. First,
26 that Oracle has prohibited the use of “automated tools” to download “significant volumes” of
27 materials from Oracle’s website (*id.* ¶ 61); that is to say, Rimini complains that Rimini cannot
28 copy Oracle’s intellectual property as easily as Rimini would like. Second, Rimini also alleges

1 that Oracle “prohibits access to and download of support materials unless such access or
 2 download ‘is in furtherance of the relationship between customer and Oracle,’” (*id.*), which it
 3 says represents Oracle’s “systemic use of anticompetitive tactics to try and maintain a
 4 stranglehold over its customers by effectively requiring them to either continue purchasing after-
 5 market support only from Oracle or forego critical support materials to which they are entitled
 6 and for which they have already paid.” (*Id.*) Rimini then alleges that the provision “gives
 7 Oracle a substantial and unfair advantage over its support and maintenance competitors.” (*Id.* ¶
 8 63.) Rimini does not allege any facts explaining how, in light of the alleged “systematic”
 9 measures that “effectively require[]” customers to purchase support only from Oracle,
 10 nonetheless “[h]undreds” of customers have “made the switch” to Rimini. (*Id.* ¶¶ 10, 61.)

11 Rimini’s third cause of action is for violation of California’s Unfair Competition Law,
 12 Cal. Bus. & Prof. Code § 17200. Rimini contends that Oracle engaged in “fraudulent business
 13 practices” based on allegations that “Oracle caused false and disparaging allegations to be
 14 published and republished by Oracle and its agents.” (CC ¶ 68.) But Rimini does not identify
 15 what these supposed allegations were. (*Id.*) Although Rimini further alleges “Oracle has also
 16 employed unlawful and/or fraudulent business practices in its dealings with industry analysts,
 17 reporters and Rimini Street’s customers and potential customers” (*id.* ¶ 69), it does not allege any
 18 facts regarding what any of those practices might be. The most Rimini alleges is that “Oracle
 19 has provided [unspecified] false and misleading information about Rimini Street to customers.”
 20 (*Id.*) Nothing in Rimini’s third cause of action goes substantively beyond anything in its first
 21 two causes of action.

22 **III. ARGUMENT**

23 Under Rule 8, a pleading may survive a motion to dismiss only if, taking all well-pleaded
 24 factual allegations as true, it contains enough facts to “state a claim to relief that is plausible on
 25 its face.” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v.*
 26 *Twombly*, 550 U.S. 544, 570 (2007)). The Court applies a two-step approach to determine the
 27 validity of claims or counterclaims. *Id.* at 1950. First, the Court must identify and disregard any
 28 “allegations in the complaint that are not entitled to the assumption of truth.” *Id.* at 1951.

Allegations in this category include any “legal conclusion couched as a factual allegation” and threadbare, formulaic “recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.* at 1949-50. Second, the Court must evaluate any well-pleaded allegations – that is, those that are not disregarded under the first step of the test – and “determine if they plausibly suggest an entitlement to relief.” *Id.* at 1951.

The Supreme Court explained the plausibility standard as follows:

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Id. at 1949 (internal citations omitted).

A. Rimini’s First Cause of Action Fails to State a Claim

Rimini’s first cause of action, for “defamation, business disparagement, and trade libel,” should be dismissed because Rimini fails to allege the substance of any particular published statement outside of Oracle’s court filings in this litigation.

Rimini conflates two distinct torts: defamation and trade libel (also known as business or product “disparagement”).² Rimini also does not specify whether it asserts that California state

² Rimini’s counterclaim does not reveal which cause of action it intends to assert. To the extent Rimini asserts trade libel, it fails to plead special damages, which are an element that must be pled with specificity under Rule 9(g). *See Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1047 (C.D. Cal. 1998). A “bare allegation of the amount of pecuniary loss is insufficient” for pleading a trade libel claim. *Id.* Under California law, Rimini must “identify particular customers and transactions of which it was deprived as a result of the libel.” *Mann v. Quality Old Time Servs., Inc.*, 120 Cal. App. 4th 90, 109 (Cal. Ct. App. 2004); *Isuzu Motors*, 12 F. Supp. 2d at 1047. Under Nevada law, Rimini must allege facts showing a “general business decline” that is the “result of the disparaging statements and the plaintiff must eliminate other potential causes.” *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 505 (Nev. 2009) Here, Rimini merely alleges: “On information and belief, Oracle’s false and disparaging statements regarding Rimini Street’s business have directly led to economic loss on the part of Rimini Street through specific loss of sales.” (CC ¶ 54.) This fails as a matter of law.

law or Nevada state law applies. Regardless of which label properly applies or which state's law applies,³ Rimini must plead facts that establish the publication of a false statement. *See Aetna Cas. & Sur. Co v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1998) (California trade libel); *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007) (California defamation); *Clark County*, 213 P.3d at 504 (Nevada trade libel); *Pope v. Motel 6*, 114 P.3d 277, 282 (Nev. 2005) (Nevada defamation).

Rimini's claim fails for at least three reasons. First, Rimini's counterclaim contains numerous unattributed quotations from Oracle's Complaint. To the extent Rimini attempts to base its claim on statements in Oracle's court filings, the claim is barred by the litigation privilege and the *Noerr-Pennington* doctrine. Second, Rimini fails to allege the substance of any supposed statement made any place other than in a court filing. Third, Rimini's pleadings are so sparse that they fail to give defendants fair notice of Rimini's claims.

1. Rimini Cannot Base a Claim on Statements in Oracle's Court Filings

Rimini's counterclaim contains numerous unattributed quotations from Oracle's Complaint. (*Compare, e.g.*, CC ¶¶ 2, 32, 44 ("corrupt" and "illegal business model," "illegal scheme," "massive theft of Oracle's software"), *with* AC ¶¶ 5, 10, 14 (same)). Thus, Rimini's Counterclaim appears to assert a defamation or trade libel claim based on Oracle's Complaint, without expressly saying so.

If the true basis for Rimini's claim is the content of Oracle's Complaint, then the state law litigation privilege plainly bars the claim, as does the federal *Noerr-Pennington* doctrine and its state-constitution analogs. The litigation privilege is absolute, and immunizes "participants from liability for torts arising from communications made during judicial proceedings." *Silberg v. Anderson*, 50 Cal. 3d 205, 214 (Cal. 1990) (citing Cal. Civil Code § 47); *accord Clark County*, 213 P.3d at 499, 502 & n.3 (same under Nevada law). Indeed, this privilege is "the backbone to

³ Nevada conflict-of-laws analysis may result in different bodies of law applying to the claim and various defenses. *Dictor v. Creative Mgmt. Servs., LLC*, 223 P.3d 332, 335-36 & n.5 (Nev. 2010). This memorandum cites both California and Nevada authority and shows that Rimini's counterclaims fail under any body of law.

an effective and smoothly operating judicial system.” *Silberg*, 50 Cal. 3d at 215 (internal citation omitted). Similarly, the *Noerr-Pennington* doctrine derives from the First Amendment’s guarantee of the right to petition, and holds that “those who petition any department of the government for redress are generally immune” from liability for those acts. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). These principles clearly bar any claim based on the contents of Oracle’s Complaint.⁴ To the extent that Rimini’s claim is based on Oracle’s litigation activity, it should be dismissed. *See, e.g., Sosa*, 437 F.3d at 940-42 (affirming dismissal of claims based on conduct protected by *Noerr-Pennington* where claimant failed to plead any applicable exception).

2. Rimini Fails to Plead Facts Showing Any Defamatory, Published Statement

Likely in recognition of this fatal flaw, Rimini studiously avoids *expressly* basing its claim on litigation statements. For example, Rimini never actually alleges that any of the quotes taken from Oracle’s Complaint were “published” – which is, of course, an element of Rimini’s claim. Instead, the only alleged “published” statements on which Rimini relies are found in cursory allegations in paragraph 45 of the Counterclaim. Under well-established precedent, those allegations fail to support a claim.

a. Rimini Must Plead the Substance of Any Allegedly Defamatory, Published Statement.

In order to adequately plead the essential element of a published, false statement, Rimini must plead the substance of the allegedly defamatory statement. Even before the Supreme Court added bite to the Rule 8 pleading standard in *Twombly* and *Iqbal*, federal cases applying

⁴ The litigation privilege and the *Noerr-Pennington* doctrine also extend to communications outside of litigation but closely related to it, such as pre-litigation demand letters. *See, e.g., Sosa*, 437 F.3d at 936-37 (affirming dismissal of claims based *Noerr-Pennington* protections for pre-litigation communications); *Aronson v. Kinsella*, 58 Cal. App. 4th 254, 261-68 (Cal. Ct. App. 1997) (applying California litigation privilege to protect pre-litigation communications); *Clark County*, 213 P.3d at 499, 502 (applying Nevada litigation privilege to protect pre-litigation communications).

California law consistently held that “[t]he words constituting a libel or slander must be specifically identified, if not pleaded verbatim.” *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1314 (N.D. Cal. 1997) (internal citation omitted); *accord Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1216 (C.D. Cal. 2004) (“Even under liberal federal pleading standards, general allegations of the defamatory statements which do not identify the substance of what was said are insufficient.”) (internal citation omitted); *see also Scott v. Solano County Health & Soc. Servs. Dep’t*, 459 F. Supp. 2d 959, 973 (E.D. Cal. 2006). The same – or higher – demands are made of California trade libel in federal court. *First Advantage Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 937-38 (N.D. Cal. 2008).⁵ And the cases applying Nevada law are in accord. *See Blanck v. Hager*, 360 F. Supp. 2d 1137, 1160 (D. Nev. 2005) (requiring plaintiff to “allege the specific statements constituting defamation”).

Moreover, following the clarification in *Twombly*, 550 U.S. at 570, and *Iqbal*, 129 S. Ct. at 1949, that a complaint must plead facts showing that a claim is “plausible,” it is clear that any defamation or trade libel claim in federal court must plead the substance of the allegedly wrongful statement: “Without any information whatsoever about the actual words that were allegedly used, neither the Court nor defendants can assess whether plaintiff has stated a plausible claim for relief sufficient to support an inference of liability.” *Ghawanmeh v. Islamic Saudi Acad.*, 672 F. Supp. 2d 3, 20 (D.D.C. 2009).

b. Rimini Fails to Plead the Substance of Any Allegedly Defamatory, Published Statement

Rimini’s only allegations of any publication by Oracle occur in paragraph 45 of the Counterclaim. Rimini alleges that statements have been “published and republished,” but does not identify who, where, when, or what was said. (CC ¶ 45.) The closest Rimini comes to pleading a specific published statement is in asserting that “an Oracle representative contacted a

⁵ Federal pleading standards govern this case, but the state standard “is highly relevant” to determining whether a false statement is adequately pled. *Church of Scientology of Cal. v. Flynn*, 744 F.2d 694, 696 n.2 (9th Cir. 1984).

1 senior analyst for an influential analyst firm and made statements insinuating that Rimini Street's
2 practices were illegal." (*Id.*)

3 Courts have consistently held that such cursory allegations are not enough to withstand a
4 motion to dismiss. For example, in *Jacobson*, the plaintiff alleged that an unidentified state
5 agent defamed him by "'spuriously leveling a false and defamatory charge against [the plaintiff]
6 of inappropriate comportment towards a female parole agent.'" 357 F. Supp. 2d at 1215
7 (alteration in original). The court held that "because the plaintiff fails to identify and state the
8 substance of the allegedly defamatory statement, the defamation claim is insufficient." *Id.* at
9 1216. For the same reason, Rimini's claim here fails. Because Rimini's general allegation that
10 an unidentified Oracle representative "made statements insinuating that Rimini Street's practices
11 were illegal" (CC ¶ 45) does not "identify and state the substance of the allegedly defamatory
12 statement," Rimini's "claim is insufficient." *Id.*

13 In *Silicon Knights*, even allegations that were substantially more specific than those made
14 by Rimini here failed to state a claim. The plaintiff there alleged that defendant had made
15 false and defamatory statements to several of Silicon Knights' customers,
16 prospective customers, industry associates and the public regarding: (a) the
17 quality and reliability of Silicon Knights' products, (b) the competence and ability
18 of Silicon Knights' employees, and (c) Silicon Knights' cooperation and ability to
19 work with customers, suppliers, or other persons in the software industry.
20 983 F. Supp. at 1313-14. Although these allegations provide more detail about the allegedly
21 defamatory statements than Rimini's allegations, the *Silicon Knights* court granted the
22 defendants' motion to dismiss because "the complaint contains only general allegations of the
23 defamatory statements and does not identify the substance of what was stated by the
24 Defendants." *Id.* at 1314. The same is doubly true of Rimini's claim.

25 In sum, because Rimini fails to identify and allege the substance of the supposed
26 "insinuation," Rimini has failed to plead facts showing its claim is plausible, and therefore its
27 claim should be dismissed. *See Ghawanmeh*, 672 F. Supp. 2d at 20. The other statements
28 alluded to in the Counterclaim – unspecified "[s]imilar allegations of illegality" and a speculative
"pattern of similar defamatory communications" that Rimini "expects" will be "illuminated" by

discovery” (CC ¶ 45) – are entirely devoid of factual content and are, at best, conjecture. Rimini’s first cause of action fails because Rule 8 “does not unlock the doors of discovery for a [claimant] armed with nothing more than conclusions.” *Iqbal*, 129 S. Ct. at 1950.

c. Rimini’s Pleading Fails to Give Oracle Fair Notice of the Claim

Rimini’s claim should also be dismissed for an independent reason. Even if Rimini had alleged facts showing a “plausible” claim – and it has not – the allegations are deficient because the claim fails to give Oracle fair notice. To meet the requirements of Rule 8, a claim must provide “fair notice of what the . . . claim is and the grounds on which it rests.” *Twombly*, 550 U.S. at 555 (citation omitted and alteration in original). Without fair notice, it would be impossible for the party adequately to answer the claim, raise affirmative defenses, or move to dismiss on grounds that are concealed by the claim’s vagueness. Thus, in *Williams v. County of Los Angeles*, No. CV-06-1766-DSF, 2006 WL 4756376, at *6 (C.D. Cal. June 19, 2006), the court dismissed a claim for defamation because the allegations were “too vague” to determine, among other things, whether the statements at issue were privileged or whether they were merely opinion and not representations of fact. The court held that the allegations did not give the defendant “fair notice of the grounds on which [the] claim is based.” *Id.*; *accord E & E Co., Ltd. v. Kam Hing Enterprises, Inc.*, No. C-08-871-MMC, 2008 WL 4962991, at *4 (N.D. Cal. Nov. 19, 2008) (dismissing where lack of specificity in defamation claim “might [make it] impossible for [the defendant] to assert a proper affirmative defense or Rule 12(b) motion challenging the claim as a matter of law”) (internal citation omitted). The same is true here in three respects.

First, as discussed above, Rimini tries to plead around the litigation privilege and the *Noerr-Pennington* doctrine by quoting from Oracle’s court filings but failing to identify the source of those quotations. If the only time Oracle has made the allegedly defamatory statements is in a court filing – and Rimini alleges no other instance in which Oracle has called out Rimini’s “corrupt” and “illegal business model,” “illegal scheme,” and “massive theft of Oracle’s software” (compare CC ¶¶ 2, 32, 44 with AC ¶¶ 5, 10, 14) – the counterclaim is barred. *See Sosa*, 437 F.3d at 941-42; *Aronson*, 58 Cal. App. 4th at 261-68; *Clark County*, 213 P.3d at 499,

502. By failing to allege any of the context for the purported statements, Rimini conceals whether the statements are subject to the litigation privilege and *Noerr-Pennington*, and thus fails to give Oracle fair notice so that it can adequately respond to the claim. *See E & E Co.*, 2008 WL 4962991 at *4; *see also Roland-Warren v. Sunrise Senior Living, Inc.*, No. 09-CV-1199-JM, 2009 WL 2406356, at *8 (S.D. Cal. Aug. 4, 2009) (dismissing defamation claim; “[T]he court cannot determine whether the statements were intended as opinion or fact or whether they were privileged. The assertions fail to put Defendants on notice of the factual underpinnings of Plaintiff’s claim.”).

Second, by omitting both the actual words and the substance of other supposed statements, and instead asking the Court to accept Rimini’s characterization of them, Rimini prevents Oracle and the Court from determining whether the statements are even susceptible to a defamatory interpretation. *See Gilbert v. Sykes*, 147 Cal. App. 4th 13, 33 (Cal. Ct. App. 2007) (“Whether a statement is reasonably susceptible of a defamatory interpretation is a question of law for the court.”); *see also Flowers v. Carville*, 266 F. Supp. 2d 1245, 151 (D. Nev. 2003) (same, dismissing certain claims under Rule 12(b)(6)); *Isuzu Motors*, 12 F. Supp. 2d at 1045-46 (same).

Third, without knowing what the statements were, it is impossible to know whether they were false, much less whether they were uttered with knowledge of falsity or reckless disregard of the truth.⁶ Rimini claims that the allegedly defamatory statement was an unspecified “insinuation” that some unspecified Rimini practices are illegal in some unspecified way. (CC ¶ 45.) Rimini does not allege *which* of its business practices were criticized. To show that an “insinuation” that Rimini’s *unspecified* “practices are illegal” was a false statement, Rimini

⁶ Rimini’s publicity-seeking makes it a limited-purpose public figure. *See, e.g., Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1162-63 (C.D. Cal. 1998) (finding corporation a public figure where it “sought out publicity both for its product, and about the lawsuit once it was filed”). Accordingly, Rimini must plead and, ultimately, prove with clear and convincing evidence that the statement was made with knowledge of its falsity or in reckless disregard of the truth. *Gertz v. Robert Welch, Inc.*, 418 US 323, 333-34 (1974).

1 would have to plead facts establishing that *none* of its practices is illegal. Instead, Rimini claims
 2 that *some* of its practices are legal, and pleads no facts that suggest any connection between those
 3 *particular practices* and whatever business practices an Oracle representative supposedly
 4 discussed with an analyst. (*Id.* ¶¶ 49-53.) Without more, Oracle is not on fair notice of the
 5 grounds on which Rimini claims the statements were false.

6 **B. Rimini Fails to State a Copyright Misuse Defense**

7 Rimini's second cause of action, which seeks a declaratory judgment as to its affirmative
 8 defense of copyright misuse, suffers from two dispositive weaknesses. First, Rimini fails to
 9 allege any conduct that could be copyright misuse because all Rimini alleges is that Oracle
 10 restricts copying and use of its copyrighted works – precisely what the Copyright Act authorizes
 11 a copyright holder to do. Rimini does not allege any conduct that expressly or specifically
 12 expands Oracle's copyrights beyond their legally protected scope by requiring customers to deal
 13 only with Oracle. In the absence of such allegations, the counterclaim does not state either a
 14 cause of action or an affirmative defense for copyright misuse. Second, even if Rimini's
 15 copyright misuse theory were viable – and it is not – Rimini once again alleges only
 16 conclusions, not facts, in support of its claim that Oracle's practices "effectively" require
 17 customers to purchase support only from Oracle. Even those conclusory allegations are
 18 inconsistent with Rimini's allegations of its own success in luring Oracle customers to switch to
 19 Rimini.

20 **1. Restrictions on Access and Use of Copyrighted Materials Are Not 21 Misuse of Copyright**

22 The essence of the grant of copyright is the exclusive right to exploit the work; that is,
 23 "reproduction and distribution of their copyrighted works [are] exclusive rights of copyright
 24 holders." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001). In this way,
 25 "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the
 26 exploitation of copyrights will redound to the public benefit by resulting in the proliferation of
 27 knowledge." *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (citation omitted) (emphasis in
 28 original).

1 The equitable defense of copyright misuse “prevents copyright holders from leveraging
 2 their limited monopoly to allow them control of areas outside the monopoly.” *A&M Records*,
 3 239 F.3d at 1026; *see also Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 521 (9th
 4 Cir. 1997) (citing *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990)). In
 5 particular, “‘most of the cases’ that recognize the affirmative defense of copyright misuse
 6 involve unduly restrictive licensing schemes.” *A&M Records*, 239 F.3d at 1027 n.8 (internal
 7 citation omitted). Typically, misuse is found when a copyright holder explicitly and
 8 unreasonably prohibits licensees from creating or using competing products or requires licensees
 9 to use non-copyrighted works. *See, e.g., Lasercomb*, 911 F.2d at 976-79 (license barred licensee
 10 from developing competing products for ninety-nine years); *Practice Mgmt.*, 121 F.3d at 520-21
 11 (license required customer’s agreement to forgo use of all competing products); *Alcatel USA*,
 12 *Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 792-94 (5th Cir. 1999) (license explicitly required
 13 licensee to use uncopyrighted items manufactured by copyright holder in order to use
 14 copyrighted software); *In re Napster*, 191 F. Supp. 2d 1087, 1106 (N.D. Cal. 2002) (license
 15 permitted copyright holder to increase its fees or terminate contract if licensee did not license
 16 music exclusively from copyright holder).⁷

17 By contrast, a license provision that controls only the access to or use of the copyrighted
 18 product cannot be the basis for a misuse defense, even if infringers might find it easier to
 19 compete against the copyright holder in the absence of those restrictions. For example, in *Apple*,
 20 *Inc. v. Psystar Corp.*, 673 F. Supp. 2d 931, 933 (N.D. Cal. 2009), Apple’s licenses permitted its
 21 Mac OS X software to be used only on Apple computers, and prohibited use on computers sold
 22 by Psystar (which were designed and sold to be used with Apple software). Although this
 23 restriction made it more difficult for Psystar to sell computers in competition with Apple, the
 24 _____

25 ⁷ The Fourth Circuit in *Lasercomb*, 911 F.2d at 978, was the first court of appeals
 26 decision to recognize copyright misuse; the Ninth, Fifth, and Third Circuits have since adopted
 27 its reasoning. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 994-
 28 95 (C.D. Cal. 2006) (citing cases).

1 court rejected a misuse defense: “Apple has not prohibited purchasers of Mac OS X from *using*
 2 competitor’s products. Rather, Apple has simply prohibited purchasers from using Mac OS X *on*
 3 competitor’s products.” *Id.* at 940 (emphasis in original). This was well within Apple’s
 4 statutory rights, and therefore not misuse. *Id.*; *see also A&M Records*, 239 F.3d at 1027 (no
 5 copyright misuse where defendants failed to show that “plaintiffs seek to control areas outside of
 6 their grant of monopoly”).

7 Reflecting the settled rule that merely controlling access to or use of copyrighted work is
 8 not misuse, courts “have summarily rejected the copyright abuse defense where the copyright
 9 owner did not prohibit its licensees from either using or independently developing a competing
 10 product.” *Microsoft Corp. v. Computer Support Servs. of Carolina, Inc.*, 123 F. Supp. 2d 945,
 11 955-56 (W.D.N.C. 2000) (granting motion to strike affirmative defense of copyright misuse); *see*
 12 *also MDY Industries, LLC v. Blizzard Entm’t Inc.*, No. CV-06-2555, 2008 WL 2757357, at *7
 13 (D. Ariz. Jul. 14, 2008) (defendant not misusing its copyrights where it did not bar third parties
 14 from developing competing software); *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp.
 15 1313, 1316-17 (C.D. Cal. 1992) (striking affirmative defense of copyright misuse where the
 16 copyright owner did not prohibit development or use of competing products); *compare, e.g.,*
 17 *Practice Mgmt.*, 121 F.3d at 520-21 (finding misuse where license required customer to forgo
 18 use of all competing products).⁸

19 2. Rimini’s Misuse Defense Fails Because It Alleges Only Restrictions on 20 Access and Use of Copyrighted Works

21 Applying this rule, the Ninth Circuit and other courts have rejected copyright misuse
 22 claims closely analogous to Rimini’s claim here. In *Triad Systems Corp. v. Southeastern*
 23 *Express Co.*, 64 F.3d 1330 (9th Cir. 1995), *overruled on other grounds by Cunningham v.*
 24 *Hamilton County, Ohio*, 527 U.S. 198, 210 (1999), the third-party service provider Southeastern

25
 26 ⁸ Although *BEC Computer* predated the Ninth Circuit’s formal adoption of the copyright
 27 misuse defense in *Practice Management*, it applied the copyright misuse standard of *Lasercomb*,
 28 which the Ninth Circuit later adopted in *Practice Management*.

1 accused Triad of copyright misuse. The court rejected that claim because Triad “did not attempt
2 to prohibit Southeastern or any other [third-party service provider] from developing its own
3 service software to compete with Triad,” but merely prevented the defendant from using Triad’s
4 software to “get[] a free ride” when servicing systems sold by Triad. *Triad*, 64 F.3d at 1337.

5 Moreover, in rejecting the copyright misuse defense, the *Triad* court followed the
6 decision in *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp.
7 356 (E.D. Va. 1994). In *Advanced Computer*, MAI made computers and software. MAI’s
8 license agreements effectively prohibited competitive service providers from even *turning on* the
9 computers at issue, making it entirely impossible for those competitive providers to service
10 customers’ computers without violating MAI’s copyrights. *Id.* at 367. Nonetheless, MAI’s
11 license agreements were not copyright misuse. The licenses did not “prevent the alleged
12 infringer from developing competing software,” *id.*, and instead “MAI is simply attempting to
13 protect the rights accruing to it as the holder of valid copyrights in its software,” that is,
14 restrictions on copying and use. *Id.* at 370; *accord Psystar*, 673 F. Supp. 2d at 930-40 (no
15 misuse where license prevented competitor from using Apple software to sell computers in
16 competition with Apple); *see also Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680,
17 690 (4th Cir. 1992) (software copyright owner requiring its software customers to purchase its
18 support services did not commit misuse because limiting the use of its copyrighted software is
19 “an exclusive right of a copyright owner”).

20 This line of cases – including *Triad*, *Advanced Computer*, and *Psystar* – shows why
21 Rimini’s misuse claim fails as a matter of law. In each of those cases, the copyright holder had
22 in place restrictions on access and use of copyrighted works which did not expressly prohibit (1)
23 the customer from doing business with a competitor; or (2) the development of competitive
24 works. Nonetheless, in each case, the restrictions had the *effect* of making it harder – if not
25 impossible – to compete against the copyright holder. And, in each case, the misuse defense was
26 rejected. *Triad*, 64 F.3d at 1337; *Psystar*, 673 F. Supp. 2d at 940; *Advanced Computer*, 845 F.
27 Supp. at 370.

28 The facts alleged by Rimini fit the same pattern. Each of the two license restrictions

alleged by Rimini is well within Oracle’s statutory rights as a copyright holder. First, the alleged limits on massive automated downloads of Oracle Software and Support Materials (CC ¶ 61) falls squarely within the scope of Oracle’s rights “to control reproduction and distribution of . . . copyrighted works, exclusive rights of copyright holders.” *A&M Records*, 239 F.3d at 1027 (citing 17 U.S.C. § 106). Second, the alleged limitation of downloads to those in furtherance of the customer’s relationship with Oracle is, as the counterclaim acknowledges, merely a restriction on customers’ “access to and download of support materials,” (CC ¶ 61), and thus falls within Oracle’s rights to control distribution of its copyrighted material.

Rimini’s assertion that these alleged restrictions “effectively” prevent customers from using third-party support providers like Rimini, (*id.* ¶ 61), cannot salvage Rimini’s claim. Rimini has not alleged any term of an Oracle agreement that bars Rimini from developing competing creative works or requires customers to agree not to do business with Rimini. Indeed, Rimini admits that Oracle does not prohibit the use or development of a competing product or service. (*Id.* ¶ 59.) Thus, regardless of the supposed “effect” of Oracle’s alleged restrictions, they do not constitute misuse. *E.g.*, *Psystar*, 673 F. Supp. 2d at 940 (“Apple’s agreement simply attempts to control the use of Apple’s own software – an area that is the *focus* of the copyright”) (emphasis in original); *Advanced Computer*, 845 F. Supp. at 370 (“MAI has not incorporated overbroad noncompetition clauses in its licensing agreements. . . . MAI is simply attempting to protect the rights accruing to it as the holder of valid copyrights in its software.”).

The reasons for the settled rule barring a claim based on an “effective” restraint are sound. That Rimini is unable to offer an attractive competing service to Oracle customers that does not depend on unlicensed access to Oracle’s copyrighted works is simply a reflection of the massive investment Oracle has made in its works, the resulting appeal of those works, and Rimini’s failure to develop and to offer an adequate substitute of its own. The “economic philosophy” of copyright “is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also Eldred*, 537 U.S. at 212 n.18 (“[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.”). It

would stand that policy (and the Copyright Act itself) on its head to use the success and appeal of Oracle’s copyrighted works, and Rimini’s failure to develop its own alternatives, as the basis to declare that Oracle cannot enforce its copyrights.

3. Rimini’s Conclusory Allegation that Oracle’s Licenses “Effectively” Prevent Customers from Using Third-Party Support Fails on the Facts Alleged by Rimini Itself and the Law

Rimini’s copyright misuse defense and counterclaim also fail because they are based entirely on conclusory allegations, are disproved by Rimini’s own allegations elsewhere in the Counterclaim, and therefore fail to “plausibly suggest an entitlement to relief.” *Iqbal*, 129 S. Ct. at 1951.

As discussed above, Rimini does not allege that Oracle *explicitly* requires its customers to forgo third-party support, but instead asserts that Oracle is “effectively requiring [customers] to . . . continue purchasing after-market support only from Oracle.” (CC ¶ 61.) But Rimini alleges absolutely no facts to show that its ability to provide competing service has in fact been “effectively” restrained. On a motion to dismiss, the court need not accept a “legal conclusion couched as a factual allegation” or threadbare, formulaic “recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 129 S. Ct. at 1949-50. Lacking “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” the copyright misuse allegations fail to satisfy Rule 8 and must be dismissed. *Id.* at 1949.

Moreover, Rimini alleges facts that undermine its conclusory allegations. Rimini claims that “[h]undreds” of customers have “already made the switch to Rimini,” and that it has enjoyed tremendous growth in terms of revenues and customers. (CC ¶¶ 10-11, 13-18.) These allegations are inconsistent with Rimini’s allegation that Oracle’s licensing practices “effectively” prevent customers from switching to Rimini. (*Id.* ¶ 61.) Consequently, Rimini has not pled a plausible claim that Oracle has “effectively” foreclosed competition. *See Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (“A plaintiff may plead herself out of court. If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the

identical facts.”) (internal citation omitted).

4. Rimini’s Copyright Misuse Affirmative Defense Should Be Stricken

Rimini’s Fourth Affirmative Defense is copyright misuse. Affirmative defenses are governed by the same pleading standard as complaints. *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 827 (9th Cir. 1979). An affirmative defense may be stricken pursuant to Rule 12(f) “when the defense is insufficient as a matter of law.” *Multimedia Patent Trust, v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1211 (S.D. Cal. 2007).

In asserting that defense, Rimini expressly relies on the allegations of the Counterclaim: “As explained by Rimini Street’s Second Counterclaim.” (Answer, p. 24.) As shown above, the misuse counterclaim fails as a matter of law. Thus, the defense should be stricken as well. *See, e.g., Computer Support*, 123 F. Supp. 2d at 955-56)(granting motion to strike misuse defense).

C. Rimini Fails to State a Claim Under California’s Unfair Competition Law

Finally, Rimini brings suit under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.* The UCL provides a cause of action for business practices that are (i) unfair, (ii) fraudulent, and/or (iii) unlawful, but a claimant must “state with reasonable particularity the facts supporting the statutory elements of the violation.” *Saldate v. Wilshire Credit Corp.*, ___ F.R.D.___, No. CV-F-09-2089-LJO-SMS, 2010 WL 582069, at *14 (E.D. Cal. Feb. 12, 2010) (quoting *Khoury v. Maly’s of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (Cal. Ct. App. 1993); accord *Fortaleza v. PNC Fin. Servs. Group, Inc.*, 642 F. Supp. 2d 1012, 1019 (N.D. Cal. 2009). Rimini makes no effort to state a claim under the “unfair” prong,⁹ and its allegations are insufficient to state a claim under the “fraudulent” and “unlawful” prongs as well.

First, Rimini fails to adequately allege “fraudulent” conduct. Rimini’s UCL claim asserts that Oracle has made unspecified “false and misleading statements,” provided unspecified “false

⁹ The Counterclaim asserts only “unlawful and/or fraudulent,” and not “unfair,” conduct. (CC ¶ 69.) Indeed, in competitor cases such as this one, conduct is “unfair” under the UCL only if it “threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (Cal. 1999). Rimini alleges nothing like that.

1 and misleading information about Rimini Street” to potential customers, and has caused
 2 unspecified “false and disparaging allegations to be published and republished.” (CC ¶¶ 67-69.)
 3 These allegations fall short of the specificity required to assert a claim.

4 Because Rimini’s UCL claim is based on allegedly false representations, the claim must
 5 satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). *See Kearns v. Ford*
 6 *Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
 7 1097, 1105-06 (9th Cir. 2003). Rule 9(b) requires the pleader to allege the “time, place, and
 8 specific content of the false representations as well as the identities of the parties to the
 9 misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal citation
 10 omitted). Here, the allegations of the Counterclaim fall far short of this standard. No time or
 11 place is alleged for any specific representation. Rimini identifies no specific individual who
 12 allegedly made a false representation. And Rimini fails to identify the specific content of any
 13 false representation. Thus, Rimini fails to state a claim for “fraudulent” conduct. *See*
 14 *Kearns*, 567 F.3d at 1126-27 (affirming dismissal of UCL claim based on “concealment”
 15 because “general pleadings do not satisfy the heightened pleading requirements of Rule 9(b)”).

16 Second, Rimini does not adequately allege any “unlawful” conduct. The “unlawful”
 17 prong of the UCL “borrows violations of other laws and treats them as unlawful practices that
 18 the unfair competition law makes independently actionable.” *Cel-Tech*, 20 Cal. 4th at 180.
 19 Rimini fails to identify any specific statute or regulation that it contends has been violated. To
 20 the extent Rimini attempts to base an unlawful claim on its tort or copyright misuse claims, its
 21 UCL claim fails for the same reasons as the tort and copyright misuse claims (as shown above in
 22 Part III.A and III.B). *See Rubio v. Capital One Bank (USA), N.A.*, 572 F. Supp. 2d 1157, 1168
 23 (C.D. Cal. 2008) (“Where a plaintiff cannot state a claim under the ‘borrowed’ law, she cannot
 24 state a UCL claim either.”). Moreover, alleged copyright misuse in particular cannot be a basis
 25 for a determination that conduct is “unlawful” because copyright misuse is merely an equitable,
 26 affirmative defense (as to which Rimini itself seeks merely a declaration), not a basis for an
 27 independent claim. *See Ticketmaster LLC v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1198
 28 (C.D. Cal. 2008).

1 For all of these reasons, Rimini fails to state a claim under any prong of the UCL, and its
2 third cause of action should be dismissed.

3
4 **CONCLUSION**

5 For the foregoing reasons, Rimini's three Counterclaims should be dismissed and its
6 Fourth Affirmative Defense stricken.

7
8 DATED: May 7, 2010

BOIES SCHILLER & FLEXNER LLP

9
10 By: /s/ Kieran P. Ringgenberg
11 Kieran P. Ringgenberg
12 Attorneys for Plaintiffs
13 Oracle USA, Inc., Oracle America, Inc. and
14 Oracle International Corp.
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2010, I electronically transmitted the foregoing **PLAINTIFFS ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION'S MOTION TO DISMISS COUNTERCLAIMS AND STRIKE AFFIRMATIVE DEFENSE** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter; all counsel being registered to receive Electronic Filing.

By: /s/ Kieran P. Ringgenberg
Kieran P. Ringgenberg
Attorneys for Plaintiffs
Oracle USA, Inc., Oracle America, Inc. and
Oracle International Corp.